Police Prosecutor Update

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There were no court decisions of particular interest to law enforcement this past month so we will review some areas of law not discussed for some time.

First, in OWI cases, what is sufficient evidence that a defendant "operated" a vehicle. Generally, there are four factors that can be used to determine whether a person operated or was in actual physical control of a vehicle: (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel.

In the following situations, the court of appeals stated that the facts presented did *not* establish that the defendant operated the vehicle. In this situation, the vehicle was parked in a tavern parking lot, the vehicle's engine and heater were running and its lights were on, the transmission was in park, and the defendant was found asleep on the driver's side. Merely showing that the defendant started the engine will not sustain a conviction. There must be some additional evidence that the defendant operated the vehicle.

In another situation, evidence of operation was not sufficient where the defendant was found in the vehicle asleep in a reclining position on the front seat, the vehicle was parked in a city parking lot adjacent to a tavern with its lights on and engine running and the defendant admitted he had been drinking in the tavern and fell asleep waiting for the vehicle to warm up.

It was also insufficient where the defendant was found asleep sitting in the driver's seat of a car with the engine running, the lights on, and the transmission in park. The car was sitting in a parking spot in an apartment complex.

The following are examples of sufficient evidence of "operating." The fact that a vehicle is "in gear" is definitely a factor to consider. Evidence that the defendant, the sole occupant of the car, was found asleep in the driver's seat, the vehicle was stopped partially on the roadway, the engine was running, and the transmission was in gear. The car was not moving because it had come to rest against a rock in an adjacent yard.

Evidence was sufficient that a driver who was behind the steering wheel of a car stuck in a snowbank with the headlights on and engine running was operating the car even though the car could not move at all.

Evidence was sufficient where an officer found the defendant asleep behind the steering wheel of a car stopped in the lane of traffic on a county road with the engine running.

Another situation involved a single-vehicle accident where the defendant was trapped behind the steering wheel. There was no ice or other obstruction in the vicinity of the collision. The Court stated that the defendant had operated the vehicle where he was found pinned behind the steering wheel of a crashed vehicle.

Finally, evidence was sufficient even though the car's lights were off and the engine was not running when an officer arrived at the scene of an accident. The defendant was found passed out behind the steering wheel of the car which had rear ended a parked vehicle. These facts supported the inference that the defendant had recently "operated" the car.

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We will very briefly review the use of enhancements to aid one's senses in the plain view context. Of course, what an officer can observe in plain view from a position where he has a right to be does not constitute a search. The widely accepted rule is that use of a *flashlight* to enhance vision does not transform observations into an unreasonable search.

At least where they are not extremely powerful or generally unavailable, *binoculars* can properly be used. However, courts are more strict with regard to observations inside one's dwelling or abode.

In Indiana, *photographing* what an officer can observe in plain view is not a search. Enlargements have generally been found acceptable. Also, use of telephonic lenses is treated the same as binoculars.

The use of *nightscopes* is not a search when used to view something or someone that, absent cover of darkness, would be open to public view.

However, obtaining by *thermal imaging* of information regarding the interior of a home that could not otherwise have been obtained without physical intrusion into the home is a search and is unlawful without a warrant.

The information discussed is found in the Indiana Prosecuting Attorneys Handbook at pp. 1-40 to 1-42 and 2-25 to 2-31.